rights. If any one wishes to know what equity means when using the phrase, "that one having two securities shall not disappoint him who has but one," let him read the decree in Arhor *v.* Laney, 2 Atk., which will be found in the noted. It means when you have got your money which you are entitled to get out of whatever security you have, and with your mode of doing this we cannot interfere, turn over the securities you no longer need to the creditor that had no claim on them, but had a claim on the one you have seen fit to exhaust, as you had a right to do." This is equity, and it is also justice. It originated when land, not being assets for simple contract creditors, a specialty creditor might exhaust the personalty and have the land free for the deed. It is rather amusing to see the rule preserved and enforced as against common creditors whose equity is precisely what that of the disappointed claimant is.

DEPARTMENT OF CONSTITUTIONAL LAW.

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GREAT BARRINGTON *v.* BERKSHIRE.[1] SUPREME COURT OF MASSACHUSETTS.

State Taxation—Stock.

A State tax on its citizens, governed by the value of their stock in foreign corporations, is constitutional.

STATE TAXATION OF STOCK IN FOREIGN CORPORATIONS.

In one sense taxation is always on property. In another, always on persons. Its imposition reduces the property *pro tanto*. We sometimes speak of a tax, however, as being on persons, when, if the person taxed fails to pay the tax, any portion of his property will be taken to pay it; and as on property, when, if the owner fails to pay the tax out of his other property, that specific property, and that specific property alone, will be taken to pay the tax. Thus, a tax on real estate in most of the States is a tax which, if not paid by the owner for the time being, is satisfied by a sale of the real estate. An

[1] 12 Peck., 572. The following is not in strictness an annotation. It is inserted here as preparatory to the principal Editorial Note in the next or June number, on "State Taxation on Corporate Franchises."

example of a personal tax would be a tax on A or B, according to the amount of stock he may hold in corporations It is satisfied by an attachment and sale of the property of the persom who has been commanded to pay the tax. In short, the obligation to pay the tax is a personal obligation, a debt due by the individual to government, and is a tax on the person under the above definition. Now this distinction between personal taxes and specific taxes on property is not one which is in any sense fundamental. The distinction aims simply at the remedies of the government for the non-payment of the tax by the owners of the property, whether it be against the person or against the property.

There are two classes of distinctions, however, between taxes which are of fundamental importance. The first class relates to their social and industrial effects. These are in the domain of politics and economics. With them the lawyer has nothing to do. The second class of distinctions is based on the phenomena taxed. By the phenomena taxed, or what we may call the "determining phenomena," I mean those things whose existence calls forth the tax. To make my meaning clear. Take a tax on every house according to the number of its windows. There is in such cases two classes of phenomena whose co-existence is necessary for the existence of the tax—a house, and windows in the house. Again take a tax, on income of 5 per cent. To this tax is necessary the receipt of money, *i.e.*, the power to purchase commodities. The phenomena taxed is the existence of a purchasing power just received by a person or legal entity entitled to hold property.

This last class of distinctions is important to the lawyer in the United States, because he lives in a country where his national and State governments have not each the unlimited right of taxation. It is a well-settled principle, in the expression, if not in the application, that a State of the United States cannot tax persons and property outside her territorial limits. Other limitations on the State power of taxation exist with which we need not deal. For the one mentioned, it will be seen that a settled criterion, as to what is a tax on persons and property outside the State, becomes at once important. At the present time, however, our constitutional law is not sufficiently developed to give us any such principle.

There are three possible criterions which can be adopted. In the first place, the Courts can say that any tax paid by a citizen within a State, and enforced against his property in the State, if not paid, is constitutional, no matter whether the phenomena, whose appearance creates the tax, exists outside of the territorial limits of the State or not. Any tax, provided it was paid by a citizen within the State, would then be constitutional. For example, a tax on all the citizens of the State, according to the value of their landed property held outside the State, being paid by a citizen within the State, or if he failed to do so, through a process of attachment against his property within the State, would be constitutional. The Courts, however, have refused to apply this principle. The case given has never come before the Supreme

Court, perhaps because no State has attempted to tax its citizens on the basis of their landed property in other States. In the case of the tax on foreign held bonds, the Court reversed the Supreme Court of Pennsylvania, which had upheld a State tax to be paid by corporations on the interest, on bonds of the corporation held outside the State, on the ground that the bonds were property in the hands of the creditor, not the debtor. We might draw from this case the principle that the fact that the tax was to be paid by a citizen of the State does not necessarily make the tax constitutional, if the determining phenomena exists outside the State. We cannot, at any rate, assert that this first criterion is one on which we can rely as determining whether a particular tax is within the meaning of the term, "a tax on persons or property within the State."

The second criterion might be that a tax was good while one class of the determining phenomena existed within the State. Take a tax, to be paid by A, of so much for every dollar's worth of business he does outside the State on every house he owns within the State. This must not be confused with a tax on all the citizens of a State on the business they do both in the State and in other States. In such a case, in so far as money is paid because of business done outside the State, it is a fact whose determining phenomena exist wholly outside the State. The case we are discussing is where part of the determining phenomena are within and part without the State. The houses are supposed to be within, the business outside, the State. We do not know of any case which has directly presented the case of a tax such as the one supposed. For reasons hereafter given, we do not believe it is the true criterion, or the one to be finally adopted, but in relation to taxes on interstate commerce it comes as near to being the one practically adopted by the Supreme Court as any other. Thus, while it is a rule that interstate commerce cannot be taxed by the States, the Court has just upheld a tax on all domestic commission merchants according to their sales, which latter, in the case before the Court, were partly of goods in other States: Ficken *v.* Shelby Co., 145 U. S., 1. The determining phenomena there were the act of becoming a domestic commission broker and the number of sales of interstate commerce partly in other States. The Court upheld the act because of its first feature. The act was in the shape of a license to become a domestic broker. This may make a difference. We do not wish to enter into that discussion here. Suffice it to point out that where one of the determining phenomena exists within the State, and is not a phenomena of interstate commerce, in the case of a license tax or franchise tax, there is a tendency to uphold the tax, even though the other determining phenomena are interstate commerce. See B. & O. R. R. Co. *v.* Md., 21 Wall., 456; State Freight Tax, 15 Wall., 232; Maine *v.* Grand Trunk R. R., 142 U. S., 221. For a further discussion of this question see Editorial Notes for June next.

We submit, nevertheless, that there is only one criterion of a tax on persons and property within the State, and that is that *all* the determining phenomena exist in the

State. The idea appeals to us that we became a nation for the purpose of establishing the complete freedom of intercourse between the States. The States were left free to govern persons or property within their jurisdiction, but each citizen had the absolute right to remove not only his person, but his property, from the State.

This freedom of the right to move our property, or act outside the State of our residence, is not perfect if the State can follow that property or that act, and measure the amount of our contribution to the State, because we happen to live there, by the amount of our property outside the State, or the number, nature or character of our acts outside the State. To tax a man on the amount of business he does outside the State, or the amount of his property outside is inquiring into his acts and his property where a State has no right to inquire, and the vice of such an inquiry will not be cured by the fact that for the imposition of the tax an inquiry into the acts and property within the State is also required. In other words, if the first criterion is bad, the second, which makes the constitutionality of the tax depend on the existence of only some of the determining phenomena within the State, is also bad.

Assuming this principle as correct, let us apply it to a particular case of great practical importance. It is said by Judge COOLEY, in his work on taxation, that "shares in a corporation are also the shares of the stockholders wherein he may have his domicile, and if taxed to him as personal estate are properly taxable by the jurisdiction to which his person is subject, whether the corporation be foreign or domestic."

The assertion is undoubtedly supported by the cases cited: Great Barrington *v.* Berkshire, 12 Peck, 572; principal case (1835); City Bk. *v.* Assessor, 30 N. J., 13 (1862); State *v.* Bentley, 23 N. J., 532 (1852); State *v.* Branin, 23 N. J., 484 (1852); Whitesell *v.* Co. of Northampton, 49 Pa. St., 526 (1865). There are an indefinite number of other cases.

That this principle is generally accepted to-day is beyond question; that it is correct, and, therefore, destined to stand the test of time may, I think, at least be doubted. A paper certificate of a share of stock is a title to property. A peculiar kind of property; property with special rights, perhaps public franchises giving eminent domain, etc., but still property. Perhaps a peculiar kind of title, carrying peculiar liabilities and rights, but still a title. In the case of a foreign corporation the property may be all without the State which imposes the tax. The peculiar rights of the corporation are also beyond the State which imposes the tax. All the property then represented by the stock may be outside the jurisdiction. The piece of paper has no value. Its value is in the property, the land, the money, the right of perpetual succession, all of which are "phenomena," to use our technical phrase, which exist outside the limits of the State. The paper purporting to be a title to a share in a railroad because it is transferable to A or B in a somewhat different way than the paper purporting to be a title to land, may, it is said, therefore, be taxed.

Of course, it is not argued that a State which incorporates a company can tax each of its shares of stock. The phenomena taxed is the issuance of a share. That

was an act in the State. According to the principle, each State could tax each share according to the dividends paid. Declaring a dividend is an act necessarily performed within the State.

But to assert, as is often done, that one can be taxed in the State of his domicile for every kind of personal property for which he holds a title, and that the situs of such property is the domicile of the owner, is a fiction of law for which we have no sympathy. It enables each State of the Union to tax property all over the United States. It enables the States of the east, where shares of corporations are largely held, to live off the west, where the corporations are doing business and owning property.

It is an argument frequently made by State attorneys-general in these tax cases that if the decision is adverse to the State her power of raising revenue will be hampered. The fact seems to be totally lost sight of, that a principle which enables State A to reach out and tax property or business carried on in State B, also enables State B to tax property and business in State A. Infinitely better would it be to establish a rule which would practically, as well as theoretically, confine each State to the property and business within its own territorial limits. W. D. L.

DEPARTMENT OF INSURANCE.

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CROTTY *v.* UNION MUTUAL LIFE INS. CO. OF MAINE.[1]
SUPREME COURT OF THE UNITED STATES.

Creditor's Policy—Insurable Interest—Recital of Debt in Policy.

A effected insurance upon his life with the defendant company, the policy containing a stipulation that the amount of the policy should be payable to the insured if he survived the term named therein; or, if he should die within that term, then "to Michael Crotty, his creditor, if living; if not, then to the said (A's) executors, administrators or assigns." A died within the term, and Crotty brought suit against the company, describing himself as a creditor of A, both at the time of the effecting of the insurance and at the date of A's death. The debt was stated to be "for various sums of money, which this plaintiff had at various times

[1] Reported.